Nos. 79-1404, 79-1408, 79-1415, 79-1489

In the Supreme Court of the United States

OCTOBER TERM, 1980

PENNHURST STATE SCHOOL AND HOSPITAL, ET AL.,
PETITIONERS,
v.
TERRI LEE HALDERMAN, ET AL.,
RESPONDENTS.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

AMICI CURIAE BRIEF OF THE PLAINTIFFS IN *BREWSTER v. DUKAKIS*, (D. Mass.); *CONNECTICUT ASS'N FOR RETARDED CITIZENS v. THORNE* (D. Conn.); *KENTUCKY ASS'N FOR RETARDED CITIZENS v. CONN* (W.D. Ky.); *WUORI v. ZITNAY* (D. Me.); *MASSACHUSETTS ASS'N FOR RETARDED CITIZENS v. DUKAKIS* (D. Mass.); *MICHIGAN ASS'N FOR RETARDED CITIZENS v. SMITH* (E.D. Mich.); *GARRITY v. GALLEN* (D. N.H.); *NEW YORK STATE ASS'N FOR RETARDED CHILDREN v. CAREY* (E.D. N.Y.); *ISOMONE v. GARRAHY* (D. R.I.); *WASHINGTON ASS'N FOR RETARDED CITIZENS v. THOMAS* (W.D. Wash.); *MEDLEY v. GINSBERG* (S.D. W.Va.); THE MASSACHUSETTS ASSOCIATION FOR RETARDED CITIZENS; KENTUCKY ASSOCIATION FOR RETARDED CITIZENS; WASHINGTON ASSOCIATION OF RETARDED CITIZENS; MASSACHUSETTS ASSOCIATION FOR MENTAL HEALTH; NEW YORK CIVIL LIBERTIES UNION; MASSACHUSETTS DEVELOPMENTAL DISABILITIES LAW CENTER; VERMONT DEVELOPMENTAL DISABILITIES LAW PROJECT; GREATER BOSTON LEGAL SERVICES, INC.; JUVENILE LAW REFORM PROJECT; AND, WESTERN CENTER ON LAW AND PROVERTY, INC. IN SUPPORT OF THE RESPONDENTS.

STEVEN J. SCHWARTZ,
ROBERT D. FLEISCHNER,
Mental Patients Advocacy Project
Western Massachusetts Legal Services
76 Pleasant Street
Northampton, Massachusetts 01060.
(413) 584-1644, ext. 265

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

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AMICI CURIAE BRIEF OF THE PLAINTIFFS IN *Brewster v. Dukakis*, et al.

INTEREST OF AMICI CURIAE

Amici Curiae* are eleven plaintiff classes of retarded and disabled residents[1] of institutions who are enforcing their right

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* The consent of all parties to the filing of this brief is on file with the Court, pursuant to U.S. Sup. Ct. R. 36.2.

[1] Since most Amici are or represent retarded persons, that term will be used throughout this brief. Amici also include individuals suffering from other disabilities, such as the mentally ill, the elderly, and emotionally troubled children who similarly are unnecessarily and inappropriately institutionalized.

to placement in less restrictive, community living arrangements;[2] four organizations of consumer advocates and parents and friends of individuals with disabilities, all of whom have participated as plaintiffs or plaintiff-intervenors in litigation involving the rights of retarded persons to placement in appropriate community alternatives;[3] and six public interest organizations which provide legal services and representation to disabled persons who reside in institutions but who desire to live in less restrictive settings in their communities.[4]

Amici have a unique interest in this litigation. Amici include tens of thousands of retarded persons who are presently

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[2] The plaintiffs in *New York State Association for Retarded Children* v. *Carey*, C.A. 72-C-356/357 (E.D.N.Y., Consent Decree April 30, 1975) (hereafter *NYSARC* v. *Carey*); *Wuori* v. *Zitnay*, C.A. 75-80-SD (D.Me., Consent Decree July 21, 1978); *Brewster* v. *Dukakis*, C.A. 76-4423-F (D. Mass., Consent Decree Dec. 7, 1978); *Massachusetts Association for Retarded Citizens* v. *Dukakis*, C.A. 75-5023-T and 75-5210-T (D.Mass., Consent Decree Feb. 16, 1979) (hereafter *MARC* v. *Dukakis*); *Michigan Association for Retarded Citizens* v. *Smith*, C.A. 8-70384 (E.D.Mich., Consent Decree Sept. 15, 1979) (hereafter *Michigan ARC* v. *Smith*); *Isomone* v. *Garrahy*, C.A. 77-727 (D.R.I., filed Dec. 9, 1977); *Garrity* v. *Gallen*, No. 78-116 (D.N.H., filed April 1978); *Medley* v. *Ginsberg*, C.A. 78-2099 CH (S.D.W.Va., filed April 21, 1978); *Washington Association for Retarded Citizens* v. *Thomas*, C.A. 79-1235V (W.D. Wash., filed June 16, 1978); *Connecticut Association for Retarded Citizens* v. *Thorne*, C.A. 1478-653 (D. Conn., filed Dec. 6, 1978) (hereafter *CARC* v. *Thorne*); *Kentucky Association of Retarded Citizens* v. *Conn*, C.A. No. 78-0157L(A) (W.D.Ky., March 21, 1980) (hereafter *KARC* v. *Conn*) are all residents of mental institutions in their respective states.

[3] The Kentucky, Massachusetts and Washington Associations for Retarded Citizens and the Massachusetts Association for Mental Health are non-profit organizations representing the interests of disabled persons in their respective states. They are all dedicated to insuring that handicapped persons are provided appropriate and adequate services in order that each may live as full and normal a life as possible.

[4] The Western Center on Law and Poverty in California, the Developmental Disabilities Center in Massachusetts, the New York Civil Liberties Union, Vermont Developmental Disabilities Law Project, and Greater Boston Legal Services, including its Juvenile Law Reform Project, are all non-profit organizations which are actively involved in representing institutionalized handicapped clients of various ages.

and needlessly confined and segregated in state institutions solely as a result of the absence of structured and supportive living environments in the community. Thus, unlike the states or professional organizations which have filed briefs in this litigation, Amici's very liberty and future may well rest on the Court's resolution of this case.

Both the majority and dissenting opinions of the Court of Appeals frankly acknowledged the illegal and inhumane conditions under which the residents of the Pennhurst State School are forced to live.[5] *Halderman* v. *Pennhurst State School & Hospital*, 612 F.2d 84, 93, 117 (3d Cir. 1979). Amici presently suffer the same indignities, experience the same pain and regression, are denied the same fundamental rights, and are similarly dependent upon the state for the provision of decent and adequate habilitation in the least restrictive setting as the residents of Pennhurst. Unless the decision of the court below is upheld, they will continue to exist under those same conditions indefinitely.

Moreover, Amici also include tens of thousands of retarded persons who presently are confined in state institutions but who have secured their right to habilitation in community programs through either court decisions or consent decrees. They share the hope that these federal orders, which depend in part on the cooperation of state officials for their effective and timely implementation, will not be undermined by a subsequent decision of this Court. Most of these cases are in delicate stages of remedial enforcement. All reflect a sensitivity to the particular policies, conditions, and realities of each state's chosen mechanism to create a comprehensive system of community services. While a consensus exists in these and other states that community programs are preferable to segregated institutions for retarded citizens,[6] the precise source of this right has yet to be articulated by this Court. A

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[5] Even the Amici states of Illinois and New Hampshire concede that the conditions at Pennhurst are deplorable. Brief of Amici Curiae Illinois *et al.* at 2.

[6] Brief of Amici Curiae Illinois *et al.* at 1.

decision denying or narrowing this critical right may not only halt the trend toward developing institutional alternatives, but might even reverse the progress made to date.

Amici, as plaintiff class members and concerned organizations, will discuss the real effects of institutional confinement on their daily lives, as well as on the lives of their family members, friends, and the forgotten people who they represent. Amici will also describe in detail the existing commitments of numerous states to relieve them of this segregated existence and provide them with normalized community living arrangements. By tracing the immediate beneficial effects of these consent orders, Amici will demonstrate the visible results of adequate and integrated community services created pursuant to federal and state policies.

SUMMARY OF ARGUMENT

The history of institutions for the retarded is a tragic chronicle of increasing segregation, degradation, and human suffering. The conditions under which institutionalized persons are confined and the resulting harm occasioned by the everyday reality of those facilities have led virtually every lower court which has confronted the issue to declare that retarded persons are full citizens entitled to at least minimally adequate habilitation in an environment least restrictive of their fundamental liberties. The Court of Appeals, in finding that Pennhurst denied its residents this basic right, did little more than adopt an emerging judicial principle and apply it to an admittedly deplorable institution.

In recognition of the well-documented failure of institutions to provide even a decent living environment, first the Congress and then later a majority of the states enacted into law the accepted policy that structured and home-like community living arrangements were the only feasible alternatives to massive,

custodial facilities for the retarded.[7] These legislative judgments have been incorporated into a compendium of federal and state statutory schemes which create a preference for community care, as found by the Court of Appeals. Unfortunately, these legislative intentions have not been translated into meaningful realities for the institutionalized retarded. Comptroller General of the United States, Report to the Congress, *Returning the Mentally Disabled to the Community: Government Needs to Do More* i-x (HRD 76-156) (1977) (hereafter cited as *Report to the Congress*). For a variety of bureaucratic reasons and particularly as a result of the parochial interests of the institutions themselves, *Id.*, Pennsylvania, like most states, has not responded to the will of elected officials and to the consensus of professionals, thereby leaving yet another generation of retarded citizens to suffer the indignities of a life of institutional confinement.

To enforce these unfilled statutory and policy mandates, disabled citizens, like other discrete minorities before them, have had no recourse but to turn to the courts for relief. Not only were the courts shocked at what they did see — the horrors of institutional care — but they were dismayed at what they did not see — adequate and available community alternatives. Although not in Pennsylvania, these legal actions often prompted recalcitrant state officials to finally move forward with the long inactive plans for the creation of comprehensive community care systems, which usually then resulted in cooperative efforts by all concerned parties to remedy this history of abuse. Whether by consent decree or court order, however, the judicial enforcement of existing law has been the essential factor in finally prompting the development of less restrictive alternatives to institutions. The

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[7] Not surprisingly, a small minority of people and a few professionals take issue with this accepted policy and with the legislative judgments which incorporate it. But where all the diverse parties to this litigation concur as to the parameters and import of this policy, the untimely protest of a disgruntled few cannot be allowed to alter the legislative judgments which incorporate these policies. *See* Pet. App. 135a.

visible effects of structured, supportive community residences have already made a dramatic difference for thousands of retarded citizens who otherwise would have been relegated to a life of institutional monotony and who instead are living normal and productive lives in the community. Given this historical reality, the relief ordered by the Court of Appeals was appropriate and not unnecessarily intrusive on the ability of the state to care for its retarded citizens in a safe and decent environment.

ARGUMENT

I. Institutions for the Mentally Disabled are Traditionally Large, Old, Remote and Inaccessible Places Which Segregate Retarded Citizens From the Rest of Society.

The federal and state statutes and policies which mandate the creation of supervised community living arrangements[8] were formulated in direct response to the documented failure of institutions to provide even minimally decent care for their retarded residents. It is precisely this history, the current reality of institutional existence, and the failure of local officials to implement those mandates that has prompted retarded citizens in several states to seek judicial enforcement of their right to live in the least restrictive environment.

A. Institutions Developed in Response to Obsolete and Ultimately Discredited Views of Retarded Persons as Socially Unfit and Inferior Individuals.

When the District Court, after hearing thirty-two days of testimony, observed that "[a]t its best, Pennhurst is typical of large residential state institutions for the retarded," *Halderman* v. *Pennhurst*, 446 F. Supp. 1295, 1302-03 (E.D. Pa.

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[8] *See* Part II *infra*.

1977), it was echoing the view of scholars, lawyers and mental retardation professionals that public institutions for the retarded share a common history and have a common effect on the people they confine.

The institutions in which the retarded citizens represented by Amici reside are strikingly similar. Generally, they are old, remote and inaccessible places created to separate the retarded from the rest of us.[9] They were developed largely as a social response to the view that retarded persons were socially unfit and inferior beings.

The beginning was grounded in benign motives and sensible theories. What may have been the first systematic survey of retarded persons was undertaken in 1846 by Dr. Samuel Gridley Howe of Massachusetts. Dr. Howe believed most of the persons he surveyed could be helped by education if given suf-

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[9] In its definition of "institution" the American Association on Mental Deficiency notes that such facilities have "traditionally been separated from the general population." American Association on Mental Deficiency, *Manual on Terminology and Classification in Mental Retardation* 5 (H. Grossman rev. ed. 1977). *See also* E. Goffman, *Asylums* xiii (1961).

The Laconia State School in New Hampshire was opened in 1903 and was first known as the New Hampshire School for the Feeble-Minded Children. 1901 N.H. Laws. c. 102, § 1. There are currently approximately 560 residents at the school living in buildings which are antiquated in construction and design. One of the defendant's experts stated in a deposition that "[m]ost of the living quarters [are] not suitable for people to live in." *Garrity* v. *Gallen, supra,* (Pls. Ex. 164 for ID at 51-52, 74).

The Northampton State Hospital has served the four western counties of Massachusetts since 1858 when it admitted it first resident. Sarah, a 77 year-old women "suffering her first attack of insanity" was transported 96 miles from her home in Andover to "New Hospital for the Insane in Western Massachusetts" at Northampton. In the 122 years since her admission over 64,500 other persons have been confined at the Northampton State Hospital. J. Geller, "Time For More Debate About Hospital," Hampshire Gazette, June 26, 1980 at 6, col. 3. By December 1976, the date of the filing of the complaint in *Brewster* v. *Dukakis, supra,* the population of the Hospital was about 500 residents. As a result of the consent decree signed in that case, the population had decreased to 257 by August of 1980 through the creation of community residential and nonresidential alternatives to the institution. *Brewster* v. *Dukakis, supra,* Monitor's Report 2 (June 15, 1980).

ficient time, a special school and special modes of instruction.[10] The Masschusetts legislature responded quickly to Dr. Howe's report by creating the first public residential institution for the retarded in America — the Massachusetts School for Idiot Children and Young. Within the next ten years New York, Pennsylvania, Connecticut, Ohio and Kentucky followed this example. The early schools emphasized education, were located near or in the hearts of communities, and the length of stay for students was expected to be short, as some improvement was felt to be a near certainty.[11]

The rapid development of asylums, with their promises of habilitation and treatment, was followed by a second phase of society's response to retardation. The early institutions for the retarded had failed to achieve even their minimal goals — many residents did not return to their families and their communities and xenophobic reactions fundamentally altered the types of people sent to institutions.[12] Such results were not compatible with the promises of quick and complete improvement. The response of public officials was to change the pur-

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[10] President's Committee on Mental Retardation, *Past and Present* 3 (1976).

[11] Wolfensberger, *The Origin and Nature of Our Institutional Models, reprinted from* President's Committee on Mental Retardation, *Changing Patterns in Residential Services for the Mentally Retarded* 31-34 (1969). During the nineteenth century institutions for the mentally ill were also established for many of the same reasons as those which gave rise to facilities for retarded persons. D. Rothman, *The Discovery of the Asylum* 130-131 (1971).

[12] Wolfensberger, *supra* note 11, at 37. The claims of the caretakers of the "insane" likewise came under attack in the mid and late nineteenth century. "Lunatic asylums" began to swell with a long-term and increasingly immigrant population. By 1864 the patient population of the Taunton (Massachusetts) State Hospital was nearly fifty percent Irish immigrants. Worcester Lunatic Hospital, *Eighteenth Annual Report* 41 *cited in* D. Rothman, *supra* note 11, at 283, 361n. 38. Walter E. Fernald, initially disagreeing with the view that a few years of institutionalization would prepare a retarded person to return home, asked: "What is to be done with the feeble-minded progeny of the foreign hordes that have settled and are settling among us?" P. Tyor, *Segregation or Surgery: The Mentally Retarded in America* 160 (1972).

pose of institutionalization from education and treatment to protection. By the 1880s the transformation in purpose was complete.[13]

Basically, protection meant isolation. Institutions quickly moved from the cities to more rural locations. Predictably, they also grew in size as it seemed more administratively convenient to provide custodial, protective care on a large scale to many residents at one time without regard to their individual strengths or needs.[14] By the turn of the century yet another negative stereotype had emerged: the retarded were beginning to be viewed as a "social menace" and associated with juvenile delinquency, crime, foreigners and other "social evils."[15]

Although this misguided generalization has been fully repudiated by government officials and professionals,[16] the states have been slow to abandon the substantial investments, both financial and philosophical, they made in institutions.[17] The result has been a reluctance to shift resources from the institution to community alternatives, and thus a continuing need to maintain the institution in some form.[18] As a result of inertia, institutions have provided a convenient, if expensive,[19] response to society's distaste for its retarded citizens.

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[13] Menolascino, *Challenges in Mental Retardation* 46 (1977).

[14] Wolfensberger, *supra* note 11, at 40-1. *See* S. Herr, *Legal Protection for Residents of Institutions for the Mentally Handicapped in New York* 57-58 (1979) (unpublished D. Phil. thesis in Harvard Law School Library).

[15] Wolfensberger, *supra* note 11, at 45-46. To counter the chance of a spread of retardation and its perceived evils, which were believed to be hereditary, the states passed laws restricting the right of a retarded person to marry and requiring sterilization. *Id.* at 54-55. *See*, Note, *Compulsory Sterilization of the Mentally Ill and Retarded: In re Sterilization of Moore*, 30 SW. L.J. 775 (1976).

[16] *See* S. Davies, *Social Control of the Mentally Deficient* 130 (1930).

[17] In New York, for example, until quite recently ninety-five per cent of state retardation expenditures went to inpatient, institutional services. S. Herr, *The New Clients: Legal Services for Mentally Retarded Persons* 41 (1979).

[18] Wolfensberger, *supra* note 11, at 77-78; *See* President's Committee on Mental Retardation, *supra* note 10, at 16.

[19] The Florida legislature has determined that institutions "are unreasonably costly, are ineffective in bringing the individual client to his or her maxi-

B. *Because of the Lack of Community Alternatives, Retarded Persons Are Inappropriately and Unnecessarily Segregated in Institutions Which Are Characterized by Deplorable Conditions, Inadequate Staffing, Excessive Physical and Mechanical Restraint, and an Environment Which Prevents Rather than Promotes Habilitation and Treatment.*

Mental institutions share not only a common past but a common present as well. The "abominable conditions to which Pennhurst residents have been subjected," *Halderman* v. *Pennhurst*, 612 F.2d at 92, are typical of most, if not all, public institutions for the disabled.[20] Thousands of handicapped citizens have been inappropriately and unnecessarily placed in such "abominable" facilities due to the lack of adequate community alternatives.[21]

Moreover, the population of institutions for the disabled includes a disproportionate percentage of traditionally powerless groups like the elderly, the young, the poor, minorities, and the more severely handicapped. *See NYSARC* v. *Rockefeller*,

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mum potential, and are in fact debilitating to a great majority of clients." Fla. Stat. Ann. § 393.062 (West Supp. 1978).

[20] In 1977 the American Psychiatric Association stated that mentally disabled people in large and remote institutions are provided "mere custody in an environment that does not even allow a minimum level of humane care." American Psychiatric Association, Task Force on the Right to Treatment, *Position Statement on the Right to Adequate Care and Treatment for the Mentally Ill and Mentally Retarded, reprinted in* 134 Am. J. Psych. 354, 354 (1977).

[21] *See, e.g., Miss Nelson, 103 Dies: Confined for a Century*, New York Times, Feb. 1, 1974, at 30, col. 2 (committed for an unknown reason at age 4, Martha Nelson was institutionalized for almost a century and no one knew why). Recently, at a Senior Citizens' Week celebration at the Wrentham State School in Massachusetts, the oldest resident was identified as an eighty-four year-old man who had been institutionalized for sixty-one years. The man was orginally committed to the school because someone feared "he might get into trouble in the community." In view of the Wrentham staff, the man is not now nor ever was retarded. Conversation with Francis Kelley, Superintendent of the Wrentham State School, September 4, 1980.

357 F. Supp. 752, 755 (E.D.N.Y. 1973). The special needs of these disabled citizens are routinely ignored in institutions. Because massive facilities demand regimentation and routine, individual differences are subordinated to the requirements of the larger group. Residents with needs related to their race, cultural background, or handicap suffer doubly from the institution's inadequacies.[22]

Mental institutions are also characterized by grossly underpaid, untrained, and insufficient staff. *Wyatt* v. *Stickney*, 344 F. Supp. 387 (M.D. Ala. 1972), *aff'd sub nom. Wyatt* v. *Aderholt*, 503 F.2d 1305 (5th Cir. 1974); *Welsch* v. *Likins*, 373 F. Supp. 487 (D.Minn. 1974), *aff'd in part and remanded in part*, 550 F.2d 1122 (8th Cir. 1977); *Davis* v. *Watkins*, 384 F. Supp. 1196 (N.D. Ohio 1974); *Evans* v. *Washington*, 459 F. Supp. 483 (D.D.C. 1978). The *Wyatt* court found that there was only one physician for every 550 residents at the Partlow School and only two of the four physicians were licensed to practice medicine in Alabama. Similar conditions have been found at most other institutions for the retarded.[23]

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[22] As the Special Master in *Wuori* v. *Zitnay*, *supra*, wrote:

> Most, but by no means all, of the residents of Pineland are severely or profoundly retarded. They have varying capabilities for accepting education. Many are multiply handicapped, suffering blindness, deafness, mental illness, susceptibility to seizures, and physical abnormalities. Many have behavioral problems of aggression or self-abuse. Some suffer in ways which even the experts cannot comprehend. But, with rare exception, they suffer most from the failure to appreciate their affirmative capabilities. They have doubly suffered who have endured years of neglect of their intellectual and physical capacities.

Report of Special Master 2 (March 19, 1979).

[23] At the Fircrest School in Washington, a special review team found the overall number of staff "grossly insufficient," the availability of professional services "rang[ing] from very limited to nonexistent," and staff development opportunities "limited or unavailable." The team concluded that "[b]ecause of the lack of sufficient numbers of resources, the staff can provide little more than basic custodial services." J. Hollis, P. McNelly, W. Jones, *Special Team Report: Visits to the Y Buildings and Madarona Building at Fircrest School* 3-4 (1980). The Laconia State School in New Hampshire has no medical di-

Even where state officials have recognized the serious deficiencies in the staffing and quality of care rendered at these institutions and have entered into consent decrees providing that staffing patterns become and remain adequate, *e.g.*, *NYSARC* v. *Carey*, *supra*, (Consent Decree, App. A, Sec. C); *MARC* v. *Dukakis*, *supra*, (Personnel Decrees, Aug. 2, 1978), there has been little success in recruiting qualified staff or improving the care at these facilities.[24] In fact, little more than custodial care can ever be provided to residents in institutions. This realization led the District Court below to follow the lead of legislatures, executive officials, and mental retardation professionals and conclude that safe and decent care can rarely, if ever, be provided within a massive state institution. *Halderman* v. *Pennhurst*, 446 F. Supp. at 1318.

Among the most restrictive and harmful conditions in institutions are the extensive use of physical, chemical and mechanical means to bind and restrain residents and the use of seclusion to segregate them in small, barren cells. *Halderman* v. *Pennhurst*, 612 F.2d at 93, 108; *Wyatt* v. *Stickney*, 344 F. Supp. at 380. Studies of these drastic interventions have concluded that they are overused, poorly monitored and employed on a routine basis.[25] Judicial decisions have likewise

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rector and chronic nursing vacancies. *Garrity* v. *Gallen*, *supra*, (Test. of Crocker, Talley; Defs.' Ex. 202). Vacancies in professional and direct care staff have resulted in the school being unable to provide individual services to residents or have forced the termination of such services. (Defs.' Admissions, p. 6.)

[24] One court official who oversees all aspects of a comprehensive remedial plan and has struggled continuously with this problem noted: "Employee recruitment and retention has become the most troublesome impediment to full implementation of the consent decrees." *MARC* v. *Dukakis*, *supra*, Report to the Court 39 (June 1979.)

[25] The Juvenile Justice Committee of the West Virginia Supreme Court of Appeals recently visited the Colin Anderson Center and reported that in one building the residents were kept in "cribs" which are "large cages with metal bars on all four sides confining a small mattress." The Committee was told that residents are kept in the cage-cribs most of the day and reported that "[a]n infant male . . . was permitted out of his crib for only two hours per day. [The Committee] observed a small girl learning to walk by moving up-

demonstrated the extent to which they are abused — often as a behavior control device made necessary because of insufficient staffing. *Rogers* v. *Okin*, 478 F. Supp. 1342, 1367-80 (D. Mass. 1979); *Welsch* v. *Likins*, 373 F. Supp. at 503. Every resident lives with the likelihood of such violence as part of his daily existence.[26]

Finally, even when not locked up or drugged, the fundamental rights of retarded persons are inevitably affected by their institutionalization.[27] *Baxtrom* v. *Herold*, 383 U.S. 107, 113 (1966). Residents in institutions live rigid, structured lives, governed by the needs of the facility and subject, in almost all their actions, to the discretion and control of the staff. *Parham* v. *J.R.*, 442 U.S. 584, 626 (1979) (Brennan J., dissenting).

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right around her cage. . . . Discussions with aides indicated that patients are not encouraged to walk. In fact, [the Committee] was left with the impression that walking is discouraged since a 'walker' is more difficult to control than a non-mobile resident. Patients who walk too much, it appeared, would be confined to their cages until 'broken' of this habit." *Interim Report on the Colin Anderson Center* 6-7 (1980). *See also* Plotkin and Gill, *Invisible Manacles: Drugging Mentally Retarded People*, 31 Stan. L. Rev. 637 (1979).

[26] For instance, an official survey in Kentucky noted that during one ten-month period, 125,739 hours of restraint and seclusion of Outwood residents was recorded. The reporters observed one nude resident tied to a toilet seat. *KARC* v. *Conn, supra*, (Pl's Ex. 85 at 171, 179) (Report of Kentucky Division of Licensing and Regulation, 1977). Witnesses at the trial testified to observing another resident tied to a radiator, sitting in his own urine. (Test. of Elkin at 414-15; Gossick at 87).

[27] Residents are traditionally deprived of their rights of liberty, privacy, association and travel. Also frequently curtailed are their rights to freely practice their religion, to communicate, to be free of unreasonable searches, to control their property, to due process, and to consent to medical treatment. *See generally* Ferleger, *Loosing the Chains: In-Hospital Civil Liberties of Mental Patients*, 13 Santa Clara Lawyer 447 (1973); *Developments in the Law: Civil Commitment of the Mentally Ill*, 87 Harv. L. Rev. 1190, 1316-1372 (1974).

C. *The Environment of a Public Mental Institution Has Profound and Adverse Effects on its Residents.*

The realities of institutional life inevitably take their toll on the residents. Institutionalized people suffer and sometimes die from physical abuse, *Wyatt* v. *Aderholt*, 503 F.2d at 1311; *Halderman* v. *Pennhurst*, 612 F.2d at 92-3; their behavior and skills regress, *Id.;* they bear the stigma of having been in an institution, *Parham* v. *J.R.*, 442 U.S. at 601; and, perhaps most tragically, as their potential for growth is smothered, they become passive, vegetative and dependent upon the institution. *See* E. Goffman, *Asylums* (1961).

The court below concluded that the environment at Pennhurst is actually "hazardous to residents, both physically and psychologically." 612 F.2d at 108. It found unsanitary conditions, urine and excrement on the floors, commonplace infectious diseases, excessive noise, and obnoxious odors. It even discovered that some residents suffered from serious injuries, inflicted by staff members, including sexual assaults. 612 F.2d at 92-3. Litanies of physical harm and death appear throughout the reported cases. *See, e.g., NYSARC* v. *Rockefeller*, 357 F. Supp. at 756 (finding that the "inhumane" conditions at Willowbrook, including the "failure to protect the physical safety of [the] children," resulted in "the loss of an eye, the breaking of teeth, the loss of part of an ear bitten off by another resident, and frequent bruises and scalp wounds"); *Wyatt* v. *Aderholt*, 503 F.2d at 1311 (four Partlow residents died due to lack of supervision, understaffing and brutality: one when a garden hose was inserted into his rectum, one after being hosed with scalding water, one after soapy water was forced into his mouth, and one by self-administered overdoses of inadequately secured drugs).[28]

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[28] Courts are frequently confronted with the shocking realities of institutional conditions at trial. A nurse at a local hospital testified that a Willowbrook resident was brought to the hospital to have a broken leg set and, thereafter, returned to Willowbrook. When next brought to the hospital his cast was soaked with urine and, when opened, contained bugs and

Confining the retarded to large, impersonal institutions actually leads to a deterioration in their behavior and functioning rather than to an improvement. In concluding that most institutional environments have an adverse effect on residents, one commentator recently observed:

> Testimony shows that residents who once spoke, stop speaking; that residents who once walked, stop walking. In short, people lose their skills for self-help and autonomy. The impersonal care of the institution produces detached, often bizarre, sometimes self-destructive behavior. Residents' tested intelligence declines.

S. Herr, *supra* note 18, at 29. The Court of Appeals specifically noted that the residents of Pennhurst suffered physical deterioration and intellectual and behavioral regression while in the institution. 612 F.2d at 93. Describing the conditions at Pineland Center, the Special Master recently wrote:

> What most of us did not know was what happened to the mentally retarded after they were committed to the state's care. Essentially they were kept. They were kept clean, kept safe, kept confined, kept bed-ridden, kept in strait jackets and camisoles, kept away from attractive things, and kept away from us. Even so, they were not

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maggots. *NYSARC* v. *Rockefeller*, *supra*, (Test. of J. Hutter, Oct. 7, 1974). An employee of a facility to which Willowbrook residents had been transferred testified to the routine use of cattle prods on residents. (Test. of R. Rubin, Oct. 2, 1974). Witnesses in *KARC* v. *Conn*, *supra*, told of a plaintiff suffering from loss of the full use of his fingers because of a compound fracture suffered at Outwood (Test. of Christian 1574-76); of a supervisor observed repeatedly slamming a resident's face against the table in the dining room (Pls.' Ex. 100 (b)); and of 304 serious reported incidents in a two year period for which residents required medical treatment. Each of the cases in which Amici have participated present similar facts and not surprisingly, most courts have reached a similar conclusion — that retarded people are being denied their right to adequate habilitation in the least restrictive environment.

> well-kept. Their care was based on a second principle of the philosophy now abandoned: that persons who are mentally retarded are incapable of learning, of growing, of having normal human experiences, of taking care of themselves, and of contributing to society. Under these conditions a person's faculties not only fail to develop to their potential but also are likely to deteriorate. The present effects of these now-abandoned practices are currently observable at Pineland Center.

Wuori v. *Zitnay, supra,* Report of Special Master 2 (March 19, 1979).

II. Federal and State Statutes and Policies Reflect a Clear Mandate to Create a System of Less Restrictive Community Programs for Disabled Persons.

A. *The Governing Federal Statutory Programs Are Designed to Encourage the Development of Community Alternatives to Institutions.*

Almost two decades ago Congress embarked on a new approach to the care and treatment of disabled persons. "This new approach involved starting a series of programs to stimulate and support an array of community services as alternatives to institutional care, which enable mentally disabled persons to remain in or return to their communities and to be as independent and self-supporting as possible." *Report to the Congress* at 1. The approach was not limited to a single statutory program but instead was incorporated in a broad array of legislation, including the Developmentally Disabled Assistance and Bill of Rights Act, 42 U.S.C. § 6000 *et seq.* (DD Act); Title XX of the Social Security Act, 42 U.S.C. § 1397 (Title XX); the Rehabilitation Act of 1973, 29 U.S.C. § 701, (Section 504); the Education for All Handicapped Act, 20 U.S.C. § 1401 (Education Act); and the Community Mental

Health Centers Act, 42 U.S.C. § 2689, (CMHC Act). Although Amici do not address in detail the threshold question of whether the DD Act establishes a particular substantive right, these federal programs represent a legislative judgment to create less restrictive community services in order to put an end to any federal support of the unnecessary and inappropriate institutionalization of retarded citizens.

1. The DD Act, through its legislative history, expresses an intention to establish community services.

In enacting the DD Act the Congress specifically found that:

> [I]t is in the national interest to strengthen specific programs, especially programs that reduce or eliminate the need for institutional care, [in order] to meet the needs of persons with developmental disabilities.

42 U.S.C. § 6000(a)(5). The articulation of this legislative purpose was the result of extensive hearings over several years during which Congress recognized that abuses in the care of retarded persons were commonplace, including "inappropriate admissions [to institutions] because of a lack of community services." 121 Cong. Rec. 16,516-17 (June 2, 1975) (Comments of Sen. Williams). To remedy this glaring deficiency the Act directed that at least sixty-five per cent of state allotments be spent on community services. 42 U.S.C. § 6063(b)(3)(B).

The legislative history of the DD Act leaves little doubt that beneath the specific intention to provide federal support to a comprehensive system of community alternatives lay the general concern that retarded persons should be treated as equal citizens and not segregated through an isolated institutional delivery system. H.R. Rep. No. 1188, 95th Cong., 2d Sess. *reprinted in* [1978] U.S. Code Cong. and Ad. News 7533, 7539-40. The Senate's consideration of the Act was based on its finding that:

> [C]ongress must take action to ensure the humane care, treatment, habilitation, and protection of the mentally retarded. The Federal Government has the responsibility to provide equal protection under the law to all citizens.

S. Rep. No. 160, 94th Cong., 1st Sess. at 32;

While the Congress acknowledged the reality that until community services were fully available for retarded persons, institutions would have to remain in some form, it declared straightforwardly that all services must be provided "in the setting that is least restrictive of the person's personal liberty." 42 U.S.C. § 6010(2); S. Rep. 160, *supra*, at 32-33. Thus the DD Act represents a fundamental Congressional judgment that federal funds should only be used to provide less restrictive alternatives for retarded citizens.

2. Title XX of the Social Security Act provides additional nonresidential support services to prevent or reduce inappropriate institutionalization.

The enabling legislation for Title XX authorized appropriations to encourage each state to furnish social services to its needy citizens pursuant to five explicit goals, one of which included "preventing or reducing inappropriate institutional care by providing for community-based care, or other forms of less intensive care." 42 U.S.C. § 1397(4). The legislative history and implementing regulations make clear that federal funds are to be used to encourage "development of safe and appropriate residential settings as an alternative to institutional living for appropriate elderly individuals and handicapped children and adults . . . ." 43 Fed. Reg. 4016 (1978). Thus Congress has determined that, in restructuring its major social services funding program, preventing institutionalization through community support systems is one of its highest priorities.

3. The Rehabilitation Act of 1973 is the major civil rights law for handicapped citizens requiring equal and accessible community services for the retarded.

Using similar language to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the Congress has declared that handicapped persons can no longer be subject to separate and unequal treatment by facilities or organizations which enjoy any federal benefits. *See* 29 U.S.C. § 794, as amended. Both the legislative history of Section 504 and its implementing regulations prohibit the continued segregation of the handicapped and require instead that services and activities for them be provided in normalized and integrated settings. Discrimination between and among handicapped persons on the basis of the severity of their disability is likewise prohibited. 42 Fed. Reg. 22,676 (1977).

Senator Humphrey, the bill's primary sponsor in the Senate, noted the basic purpose of Section 504:

> [T]he fundamental fact that one confronts is . . . the segregation of millions of Americans from society — suggesting a disturbing viewpoint that these people are not only forgotten but perhaps expendable.

118 Cong. Rec. S9495 (March 22, 1972). In mandating equal and accessible services for the handicapped, Congress recognized that traditionally institutions were the primary mechanism utilized by society to segregate retarded persons. The remedy to this historical neglect was to be decent services in open, community settings. Senator Humphrey said:

> I am calling for public attention to three-fourths of the Nation's institutionalized mentally retarded, who live in public and private residential facilities which are more than 50 years old, functionally inadequate, and designed simply to isolate these persons from society.
>
> These people have the right to live, to work to the best of their ability — to know the dignity to which every

> human being is entitled. But too often we keep children, whom we regard as "different" or a "disturbing influence," out of our schools and community activities altogether . . . . Where is the cost-effectiveness in consigning them to "terminal" care in an institution?

118 Cong. Rec. S525 (Jan 20, 1972). Congress, in declaring that the handicapped are to be treated as equal citizens, enacted yet another legislative directive requiring that the retarded be cared for in their communities.

4. The Education for All Handicapped Act requires integrated community educational programs for all retarded children.

In response to the landmark decisions in *Pennsylvania Association for Retarded Citizens* v. *Pennsylvania*, 343 F. Supp. 279 (E.D. Pa. 1972) and *Mills* v. *Board of Education*, 348 F. Supp. 866 (D.D.C. 1972), in which the lower courts recognized that all mentally retarded children can benefit from a formal program of education and training, the Congress enacted the Education for All Handicapped Act of 1975, 20 U.S.C. § 1401. The legislation broadly mandates that all handicapped children be provided with a "free, appropriate public education and related services designed to meet their needs." *Id.* The Act further requires that each child's educational program be provided in a setting which is both integrated and the least restrictive possible in order to ensure:

> [T]hat to the maximum extent appropriate, handicapped children, including children in public or private institutions or other care facilities, are educated with children who are not handicapped . . . .

45 C.F.R. § 121a.550. *See* 20 U.S.C. § 1412(5)(B).

Given the recognized detriments of educating children in isolated or culturally segregated settings, *Milliken* v. *Bradley*, 433 U.S. 267 (1977), the Congress acted to prevent further un-

necessary institutionalization of the retarded and to increase the likelihood that presently institutionalized persons could one day become productive citizens. *See* S. Rep. No. 94-168, 94th Cong., 1st Sess. *reprinted in* [1975] U.S. Code Cong. and Ad. News 1433. The Education Act represents yet another example of the legislative judgment that retarded persons can no longer be segregated and denied the same opportunities to learn and grow as are available to other citizens.

5. The Community Mental Health Centers Act establishes a network of federally supported community services as an alternative to state institutions.

The Community Mental Health Centers Act, 42 U.S.C. § 2689, was originally enacted to encourage states, through limited "seed money," to create comprehensive systems of community alternatives to state mental hospitals. Soon this limitation on federal involvement was discarded in favor of fundamental Congressional support for community services. In the 1978 Amendments Congress found that "[C]ommunity mental health care is the most effective and humane form of care for a majority of mentally ill individuals." Pub. L. No. 94-63, § 302(b), *reprinted in* [1978] U.S. Code Cong. and Ad. News 9042, 9048. These amendments also mandate that each center provide a number of essential services, including residential and nonresidential programs for formerly institutionalized persons. 42 U.S.C. § 2689(b)(1).

The legislative history of the CMHC Act discloses the continuing recognition that:

> [C]ommunity settings with supportive services would facilitate the capability of . . . clients to live more independent, functional lives and to avoid unnecessary institutionalization.

[1975] U.S. Code Cong. and Ad. News 469, 540. Since 1963 Congress has repeatedly noted the benefits of community care for disabled persons and has not hesitated to provide increased

federal support to mental health centers as the only viable and effective alternative to unnecessary and detrimental institutionalization. *National Council of Community Mental Health Centers, Inc.* v. *Weinberger*, 361 F. Supp. 897 (D.D.C. 1973).

When these five federal statutory programs are taken together, an unmistakable pattern emerges — care and treatment in community programs is not only the preferred alternative to the institutionalization of retarded persons but the primary approach which has received Congressional endorsement. While much of the promise of these legislative pronouncements remains unfulfilled, *Report to the Congress* at i-x, the mandate to create an integrated network of community alternatives is unmistakable.

B. *State Statutes and Policies Mandate the Establishment of a System of Community Programs and Require that Retarded Persons Be Treated in Less Restrictive Settings than Institutions.*

Following the lead of the Congress, numerous state legislatures have enacted statutory requirements that retarded persons be provided with adequate services in the least restrictive alternative. The federal initiative, originally incorporated in the Mental Retardation Facilities and Community Mental Health Centers Construction Act of 1963, Pub. L. No. 88-164, 42 U.S.C. § 2689, has led many states to begin to establish comprehensive systems of residential and nonresidential programs based on local administrative structures.

Generally, this effort is the product of a legislative mandate declaring that community services must be created to avoid the unnecessary institutionalization of disabled persons. In addition, executive agencies responsible for the care and treatment of the retarded have extensively documented the need for various residential and support services and have described in detail the necessary steps and resources required to develop such alternatives. While states may differ as to the precise services they should fund, or the most effective adminstrative

mechanism to design, create, or coordinate these community programs, or even the rate at which these services should be initiated, there is virtual unanimity that community alternatives are preferable and necessary to avoid the human and fiscal costs resulting from the historical reliance on institutional care. *See* note 19 *supra*.

1. Numerous state statutes require the creation of a system of community programs as an alternative to institutionalization.

State governments have traditionally relied on massive public institutions to house their handicapped persons. The limitations and tragic consequences of this approach have been convincingly documented by government officials, lower courts, and mental retardation professionals. As local citizens have become increasingly alarmed at the rising costs of institutional care and the inhumane consequences of discharging formerly institutionalized persons to the streets, without adequate support services, public officials have moved gradually to formalize a state policy for community care. This policy has been commonly incorporated in legislation, using broad language to mandate the development of community alternatives to institutionalization:

> Therefore, it shall be the policy of the state . . . to develop a comprehensive, integrated system to serve the full-range of needs of the mentally retarded and developmentally disabled by expanding the numbers and types of community based services and developing new methods of service delivery. . . .

N.Y. Mental Hyg. Law § 1302 (McKinney).

> It is the intent of the Legislature to establish a . . . system of residential treatment programs in every county which provide, in each county, a range of available services which will be alternatives to institutional care and are

> based on principles of residential, community-based treatment.

Calif. Welf. & Inst. Code § 5450 (West).

> The department shall establish a comprehensive program of community mental health and retardation services . . . and shall establish standards for the development of said community programs on area and regional levels.

Mass. Gen. Laws c. 19, § 17 (West). *See also* Colo. Rev. Stat. § 2710.5-101; Ky. Rev. Stat. § 210; Me. Rev. Stat. c. 221, § 2601 and c. 186-A, § 2141; N.H. Rev. Stat. Ann. §§ 171-A:1 *et seq.* and 126-A:39.

Moreover, a majority of the states have recognized the appropriateness and necessity of providing care and treatment in less restrictive community programs, wherever possible, and have incorporated this judgment in their statutory schemes regulating admissions and commitments to public institutions. *See Table of State Statutes* in Brief of Respondent Halderman *et al.*

In jurisdiction after jurisdiction, state legislatures have followed the lead of the Congress by acting affirmatively to end the historical reliance on institutions and to require the creation of community alternatives for retarded persons. Although the shift from institutional to community services is not administratively simple,[29] this judgment, and the entitlements created thereunder for retarded citizens, offer the poten-

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[29] The inertia of institutions has proved to be highly resistant to legislative directives and executive guidelines favoring treatment in the community. *Report to the Congress* at 24. President's Panel on Mental Retardation, *Report to the President* 143 (1962). Recognizing that new service delivery approaches may require new administrative structures to ensure their effectiveness, many state legislatures have formalized their commitment to community care through either the creation of separate agency divisions in each local community or through the use of existing governmental units to develop this system of institutional alternatives. Ky. Rev. Stat. § 210.410(6); N.H. Rev. Stat. Ann. § 171-A: 18; Me. Rev. Stat. c. 223, §§ 2611 & 2643; Mass. Gen. L. c. 19, §§ 17-24.

tial for decent, integrated, and accessible community services to those who have been hidden so long from the public view.

2. State officials have documented the appropriateness of providing care to most institutionalized persons through community programs.

The legislative directives to create a system of community alternatives has been fully supported, at least in theory, by state executive officers.[30] There are literally a myriad of pub-

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[30] This policy was recently articulated by the highest executive official in the Commonwealth of Massachusetts in the following message to the Senate and House of Representatives:

> Reflecting the social attitudes and scientific beliefs of the era, the Commonwealth began in the early 19th century to create asylums and other institutions for those afflicted with a variety of social or health problems. For corrective or therapeutic reasons, these institutions removed people from society and effectively banished them to care in remote locations. Over the past century and a half, the Commonwealth has maintained and increased these institutional services.
>
> The Massachusetts mental health hospital system has been faced with increasing difficulty during recent years. Foremost among these has been the stigma of a segregated state mental health delivery system whose clients have borne the twin burdens of poverty and discrimination due to mental illness. The remote location of many of our state mental hospitals has created problems in recruiting and retaining professional staff. The lack of access to community resources has isolated the clients and removed them from rehabilitative contact with their families and friends. The hospitals' large size has resulted in exhorbitant maintenance and energy costs. The heating costs at Boston State Hospital are now over $12,000 per client for this year and are rising rapidly.
>
> . . . . . .
>
> I believe that [community based] programs have demonstrated their therapeutic merit and efficacy and that they are financially feasible. What is perhaps most important, people have demonstrated a willingness to end the stigma which has for centuries thwarted the rehabilitation of those less fortunate citizens. We have recommitted ourselves to the historic values that people should be free and independent, assisted and maintained, where necessary, in the least restrictive settings consistent with the protection of the public and the individual.

Preamble to House Bill No. 6013, submitted by Governor Edward J. King to the Massachusetts General Court (March 3, 1980).

lic documents produced by a wide variety of state agencies attesting to the pressing need for additional community programs to eliminate the unnecessary confinement of most institutionalized persons. *See, e.g., KARC* v. *Conn., supra,* (Pls.' Ex. 103) (Kentucky Legislative Research Commission, *Society's Stepchildren: The Mentally Retarded,* 1974); Massachusetts Department of Mental Health, *Five Year Plan* (1977); New Hampshire Division of Mental Health, *State Plans (*1978 and 1979); Vermont Department of Mental Health, *Mental Retardation Plan* (1979).

These documents reflect the considered judgment of mental retardation professionals and represent the express policies of each state. While they may differ as to both the specific community programs needed by a particular institutional population or the procedures for creating these programs, there is a remarkable consensus among state officials that most institutionalized persons could be more adequately and less intrusively served in a community care system.[31]

Thus state governments have, in following the initiative of the Congress, adopted a series of statutes and policies to supplement the federal mandate for the development of community alternatives to public institutions. But as long as implementation of this consensus judgment remains limited, *Report to the Congress* at 19-23, its import for the institutionalized is but an unfilled legislative promise.

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[31] Even Pennsylvania has accepted this view, as noted by a dissenting minority of parents. Motion to File Amici Curiae Brief of the Congress of Advocates *et al.*, ¶ 7.

III. Federal Litigation is Necessary to Redress the Continuing Violation of the Rights of the Institutionalized Disabled and to Prevent Further Harm and Deterioration.

A. *The Enactment of Federal and State Legislation and the Formulation of Related Policies Requiring the Development of Community Alternatives Did Little to Improve the Plight of Institutionalized Retarded Citizens.*

Unfortunately, although Congress and state officials had fashioned a policy to respond to the unacceptable consequences of institutionalization, these mandates did not produce any immediate benefit to the hundreds of thousands of citizens confined in those facilities.[32] *Report to the Congress* at i-x. For various reasons these statutory promises were not translated into meaningful realities,[33] thereby leaving retarded citizens to suffer the continuing harms of unnecessary and prolonged institutionalization.[34] In jurisdiction after jurisdiction,

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[32] In Massachusetts, ten years after the passage of the Comprehensive Mental Health and Retardation Services Act (1966 Mass. Acts c. 735, Mass. G.L. c. 19, §§ 17, 24), which required the creation of a broad range of community services for mentally retarded and mentally ill citizens, the Department of Mental Health had barely succeeded in the preliminary task of implementing an administrative framework to design and create this community system. Only a handful of publicly supported programs had been established for disabled persons. The experience with similar statutory requirements in other jurisdictions was no better. *Halderman* v. *Pennhurst, supra*. *See* Coleman and Gilbert, *Stalking the Least Restrictive Alternative* 31 (1979).

[33] Legislative mandates were frequently frustrated by bureaucratic resistance to change, particularly by those in positions of authority in the institution; by the lack of cooperation between governmental agencies; by the absence of systematic planning; and by the absence of administrative directives and guidelines necessary to accomplish any modification of service delivery. *Report to the Congress* at 23-25. *See* L. Bachrach, *Deinstitutionalization: An Analytical Review and Sociological Perspective* (ADM 76-351) (1976).

[34] In Massachusetts the census of the state schools for the retarded only slightly decreased between 1963 and 1974 — the first decade after the General Court enacted its community services legislation. Moreover, many of these persons were simply transferred to large nursing facilities. *Report to*

facility after facility, inertia has resulted in the states' failure to implement the guarantee to minimally adequate care in less restrictive and more normal settings.[35] *Report to the Congress* at 19-21. This recalcitrance violates both legislative and executive directives as well as professionally accepted norms of decent treatment, leaving the institutionalized retarded in the same position they were in prior to the promulgation of these policies.[36]

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the Congress at 11-14. There were still 6,900 retarded persons confined in institutions as of 1975, under conditions which even state officials acknowledged to be inhumane and a public embarrassment. *Id.* (Letter of Jerald L. Stevens, Secretary of the Executive Office of Human Services, April 5, 1976) *included as* App. VII to *Region One Report* 89.

[35] In Kentucky a federal court recently recognized the state statutory right under Ky. Rev. Stat. § 202B to treatment in the least restrictive alternative. *KARC* v. *Conn, supra.* Neither the statute nor the frequent acknowledgment by state officials of the need to develop community services has resulted in any reduction in the number of retarded citizens who are institutionalized in Kentucky. (Pls.' Exs. 103-05, 800-02) (various studies, reports, and plans by the Kentucky Division of Mental Retardation and the legislative Subcommittee on Mental Health Facilities). On the contrary, the number has increased in the past five years. *Id.*

[36] In fact, in some jurisdictions the situation may have worsened. In an apparent attempt to honor legislative mandates, but often in response to the rising costs of maintaining large mental institutions, state agencies undertook a somewhat haphazard program of discharging disabled persons from these facilities into communities, with little or no community-based residential care or support services necessary for their safety and protection. Not surprisingly, the national readmission rate to institutions for the retarded doubled between 1963-1971 and in Massachusetts, it increased by more than ten fold. *Report to the Congress* at 21-3. Since the carefully drawn legislative and executive preference for community alternatives was never intended to focus exclusively on reducing the census of state institutions but rather on creating adequate community programs, these oft-publicized actions were not actually undertaken in furtherance of accepted state policies. The resultant "dumping" of helpless disabled citizens into unfamiliar and sometimes unreceptive neighborhoods did little to further the success of these policies, to say nothing of the quality of life for their intended beneficiaries. *See* Bassuk and Gerson, *Deinstitutionalization and Mental Health Services*, 238 Scientific American 46 (February 1978); *Koenig, P., "The Problem That Can't Be Tranquilized," New York Times* (Magazine) (May 21, 1978); *Deinstitutionalization*, Public Employee (May 1979).

B. *The Invocation of the Federal Judicial Power Was Appropriate and Necessary to Remedy the Violation of Established Federal and State Rights to Adequate Care in Less Restrictive Community Alternatives.*

In this context of continuing harm to disabled persons, through confinement under illegal institutional conditions or discharge to virtually non-existent community support programs, the retarded frequently had to turn to the courts to vindicate their legal rights. All the litigation shared a common theme: the systematic failure to implement established rights and policies favoring community treatment in less restrictive settings had resulted in the unnecessary and prolonged institutionalization of handicapped persons. *E.g., Dixon* v. *Weinberger*, 405 F. Supp. 974 (D.D.C. 1975); *NYSARC* v. *Rockefeller, supra*; *Wuori* v. *Zitnay, supra*; *Brewster* v. *Dukakis, supra*. The plaintiffs sought little more than the enforcement of existing guarantees to minimally adequate care in appropriate, less restrictive alternatives, as set forth in federal and state statutes and policies. Like minority school children before them, *Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), they had to rely on the federal courts to redress the historical pattern of illegality which characterized the treatment of the disabled.

In virtually every adjudicated case involving an institution for the retarded, the lower courts found a pervasive pattern of segregated and inhumane conditions in violation of constitutional and statutory guarantees. *Wyatt* v. *Stickney, supra*; *Welsch* v. *Likins, supra*; *Davis* v. *Watkins, supra*; *NYSARC* v. *Rockefeller, supra*; *Saville* v. *Treadway*, 404 F. Supp. 430 (M.D. Tenn. 1974); *Gary W.* v. *State of Louisiana*, 437 F. Supp. 1209 (E.D. La. 1976); *Evans* v. *Washington, supra*; *Halderman* v. *Pennhurst, supra*. *Contra, KARC* v. *Conn, supra*. Regardless of the source of the right, the illegality of much institutional confinement is beyond dispute. *Halderman* v. *Pennhurst*, 612 F.2d at 117 (Seitz, C.J., dissenting).

For federal courts to recognize and redress constitutional and statutory violations is the traditional business of the federal judiciary. *Monroe* v. *Pape*, 365 U.S. 167 (1960); *Hutto* v. *Finney*, 437 U.S. 678 (1978); *Hills* v. *Gautreaux*, 425 U.S. 284 (1976). Thus to the extent that retarded persons are locked in massive state facilities under unconstitutional conditions or in violation of federal statutory rights, considerations of federalism present no barrier to the intervention of federal courts.[37] It was precisely in recognition of this fact that Congress recently enacted legislation authorizing the federal government to initiate legal action to protect the rights of institutionalized persons. P.L. No. 96-247 (May 23, 1980).

These are not cases where the class of persons harmed is speculative, *Rizzo* v. *Goode*, 423 U.S. 362 (1976), where the function involved is totally within the province of the states, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976), or where pending state proceedings countenance judicial restraint, *Younger* v. *Harris*, 401 U.S. 37 (1971). Rather, the confinement of retarded persons in facilities which receive substantial federal financial support, are subject to extensive federal regulation, and are nevertheless being operated in contravention of constitutional guarantees and statutory requirements are appropriate subjects for federal court adjudication. *Halderman* v. *Pennhurst*, 612 F.2d at 92.

Similarly, given the pervasive pattern of illegality found by the courts or acknowledged by state defendants, *e.g.*, *MARC* v. *Dukakis*, *supra*, it can hardly be argued that the judiciary should refrain from ordering remedial action by those agencies responsible for perpetrating such conditions and for failing to implement statutory and governmental policies mandating community services. No doctrine of restraint has ever been held to justify judicial sanctioning, through inaction, of executive independence in violation of an individual's established constitutional or statutory rights. *United States* v. *Nix-*

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[37] Even the petitioners and supporting amici concede this to some extent. *See* Amici Curiae Brief of Illinois *et al.* 2; Brief of Petitioners, note 18.

on, 418 U.S. 683 (1974). Courts have traditionally mandated actions by local boards of education, *e.g.*, *Milliken* v. *Bradley*, *supra*; housing authorities, *e.g.*, *Hills* v. *Gautreaux*, *supra*; welfare departments, *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332 (1979); electoral commissions, *e.g.*, *Baker* v. *Carr*, 369 U.S. 186 (1962); prison authorities, *e.g.*, *Procunier* v. *Martinez*, 416 U.S. 396 (1974); and civil service commissions, *e.g.*, *Elrod* v. *Burns*, 427 U.S. 347 (1976) whenever federal rights have been abrogated. *See* Dorsen, *Separation of Powers and Federalism: Two Doctrines With a Common Goal*, 41 Albany L. Rev. 53 (1977).

Moreover, retarded citizens are a discrete and insular minority who have little ability to affect the political process and often are even denied their right to vote. *See Boyd* v. *Registrars of Belchertown*, 368 Mass. 631, 334 N.E.2d 629 (1975). While attention need be paid to the scope of the judicial remedy in order to foster the necessary cooperation for securing the full vindication of the rights in question, the appropriateness of federal adjudication of federal and pendent state law questions cannot be disputed. Where, as here, retarded persons are denied the opportunity to live in decent residential environments in their home communities and instead are needlessly confined under inhumane conditions in large state institutions — all in contravention of a range of federal and state guarantees mandating a system of community support programs — federal court intervention is both appropriate and essential.

C. *The Judicial Enforcement of the Right to Adequate Care in Less Restrictive Community Alternatives Has Expedited the Implementation of State Policies Favoring the Development of Community Programs.*

The federal suits filed to redress the persistent violations of the right to adequate care in less restrictive, community programs have produced a significant improvement in the conditions under which retarded persons are provided publicly funded care and habilitation. In many states these suits have

served to publicize the deplorable conditions in institutions for the retarded and to galvanize the necessary commitments to begin the task of establishing community alternatives. *See, e.g., Wyatt* v. *Stickney, supra*; *NYSARC* v. *Rockefeller, supra*. In most jurisdictions this task is already an accepted, if not required, governmental responsibility. Therefore, federal suits are usually in the nature of enforcement actions, with the argument, if any, focusing on how to implement an acknowledged mandate rather than whether such a policy consensus exists or should exist. *Halderman* v. *Pennhurst*, 612 F.2d at 93; *NYSARC* v. *Carey, supra*; *MARC* v. *Dukakis, supra*; *Brewster* v. *Dukakis, supra*.

Not surprisingly, many of these suits have resulted in consent decrees whereby state defendants have acknowledged not only the desirability but also the legal appropriateness of developing community alternatives to institutions. *NYSARC* v. *Carey, supra*; *Horacek* v. *Exon*, 357 F. Supp. 71 (D. Neb. Consent Decree Oct. 31, 1975); *Sidles* v. *Delaney*, C.A. C75-200A (N.D. Ohio, Consent Decree Apr. 26, 1976); *Doe* v. *Hudspeth*, C.A. J. 75-36(N) (S.D. Miss., Consent Decree Feb. 19, 1977); *Wuori* v. *Zitnay, supra*; *Brewster* v. *Dukakis, supra*; *MARC* v. *Dukakis, supra*; *Michigan ARC* v. *Smith, supra*; *Evans* v. *Washington, supra*; *Dixon* v. *Harris*, C.A. 74-285 (D.D.C, Consent Decree April 30, 1980).

Such judgments not only reflect the consensus among the parties as to the appropriate direction for basic services to retarded persons but also provide a constructive partnership for the development of legally adequate community programs. In fact, many of these negotiated settlements have already produced the plan for, and the first few steps of, a comprehensive remedy. *NYSARC* v. *Carey, supra*; *Wuori* v. *Zitnay, supra*; *Brewster* v. *Dukakis, supra*; *MARC* v. *Dukakis, supra*; *Michigan ARC* v. *Smith, supra*. Thus at least for a portion of the institutionalized retarded, their guarantee of adequate care in the least restrictive alternative is finally being translated into a visible reality.

The emerging community system jointly designed by all the parties is comprised of three components. Community residences and living arrangements integrated into local neighborhoods represent the basic environments in which retarded persons can live free of the stigma and inhumanity of institutional warehouses.[38] Nonresidential habilitation and support services provide the daily education, training and treatment programs which many persons need to assist them in gaining their independence and becoming self-sufficient, productive members of society.[39] Finally, administrative offices design, coordinate, manage, license and monitor this network of community programs.[40]

Community services are built upon the concept of individualized program planning which parallels the Congressional approaches to special education and vocational pro-

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[38] These settings include group homes, apartments, family care situations, intermediate care facilities, and other residential environments with various levels of structure and support. Each is designed to be as homelike and normal as possible with kitchen, bedroom, and common spaces which respect individuals' rights to privacy, personal choice, and dignity. *See, e.g., Brewster* v. *Dukakis, supra* (Att. B); *MARC* v. *Dukakis, supra* (Community Plan, App. D); *Wuori* v. *Zitnay, supra* (App. B, Sec. F). *See also* President's Commission on Mental Retardation, *Mental Retardation: The Known and the Unknown* (DHEW No. (OHD) 76-21008); C. Cherrington and G. Dybwad (eds.), *New Neighbors: Retarded Citizens in Quest of a Home* (1974).

[39] These programs include, among others, clinical assessment, community service coordination, day habilitation, prevocational and work training, respite care, crisis intervention services, and special education. *See, e.g., MARC* v. *Dukakis, supra* (Community Plan, App. I), *Brewster* v. *Dukakis, supra* (Att. C); *Wuori* v. *Zitnay, supra* (App. B, Sec. D). Without these daily activities retarded persons in the community would receive no treatment or training and would be relegated to a life of watching television and wandering the streets, thus reinforcing the previous practices of dumping formerly institutionalized persons into unreceptive and inadequately prepared neighborhoods.

[40] These management functions are the critical link to ensuring that disabled clients are not abandoned and commonly programs are held accountable as part of a complex network of geographically dispersed services. *See, e.g., MARC* v. *Dukakis, supra* (Community Plan, App. E); *Brewster* v. *Dukakis, supra* (Att. F); *Wuori* v. *Zitnay, supra* (App. B, Sec. C).

grams. *See* 20 U.S.C. § 1401 (19) and 29 U.S.C. § 722.[41] Individualized plans not only help match the development of community programs to the persons which they serve, thereby avoiding the impersonal regimentation of institutional care, but also provide a dynamic mechanism to ensure that clients are not forgotten and instead receive periodic reviews of their progress toward more independent living. Some decrees also make special provisions for the training and reallocation of institutional staff into the community,[42] and for standards governing quality of care and clients' legal rights in community programs.[43] Most leave the specification of implementation details and the responsibility for actually accomplishing the promise of the federal court order to the relevant state agencies with authority over the mental retardation or mental health system. *NYSARC* v. *Carey, supra* (Consent Decree, Part V); *Brewster* v. *Dukakis, supra* (¶ 49). But in all cases where implementation of an agreed upon remedy has in fact begun, community alternatives are emerging, which, for the first time in almost a century, present the potential for a safe, decent, and humane environment where retarded people can actually grow rather than regress.

D. *The Development of Community Programs Has Already Had a Significant, Positive Effect on the Quality of the Lives of Formerly Institutionalized Persons.*

For retarded persons who often have been confined for decades in state institutions, the transition to new homes in their original communities is sometimes a difficult but always

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[41] Most judicially approved settlements require individual service plans. *See, e.g., NYSARC* v. *Carey, supra*; *Brewster* v. *Dukakis, supra* (¶¶ 26-30); *Welsch* v. *Dirkswager*, C.A. No. 4-72 C. 451 (D. Minn., Consent Decree Dec. 1977).

[42] *See, e.g., NYSARC* v. *Carey, supra* (App. A, Pt. E); *Brewster* v. *Dukakis, supra* (¶¶ 34-37).

[43] *See, e.g., Brewster* v. *Dukakis, supra* (¶ 32); *Wuori* v. *Zitnay, supra* (App. B, Secs. F, G); *NYSARC* v. *Carey, supra*. *See also* 104 Code of Massachusetts Reuulations (C.M.R.) 20.00 for regulations governing community residential and nonresidential care for retarded persons in Massachusetts.

a unique and humanizing experience. Even within the few years since court approved settlements establishing community programs have been in effect, there is already documented improvement in the lives of thousands of retarded citizens. Evaluations by consultants and reports of court-appointed monitors emphasize the substantial benefit these cases have had for formerly institutionalized persons. *MARC* v. *Dukakis, supra*, Report to the Court (Dec. 1979).

Of the 5000 class members at Willowbrook, more than 1500 have already been successfully placed in small community living arrangements of no more than ten persons. Many of these former state school residents are severely and profoundly retarded. They are personally supported by an extensive network of case managers to monitor their needs and assist them in obtaining appropriate services. By all reports, including studies conducted by state officials and the Willowbrook Review Panel, the residents are thriving in their new homes. This conclusion is fully supported by an observation of the Special Master in *Wuori* v. *Zitnay, supra*:

> Nearly the full promise of the Court's decree is now being realized by clients living in new group homes and participating in new day-activity and work programs. They live in attractive, substantial, noninstitutional group homes. Their lives are active and filled with opportunities to learn. Persons running the new homes and programs tend to be concerned for their clients and share the philosophy of self-sufficiency and independence which underlie the decree. They are working diligently to help people help themselves. Anyone who may entertain doubts about the worth of the undertaking represented by the Court's decree must see the new group homes and programs.

Report of the Special Master 9 (March 19, 1979). A similar theme was echoed by the Monitor in *Brewster* v. *Dukakis, supra*:

> Almost universally, these residential sites, with support from day treatment, day activity or vocational programs, constitute a vastly improved environment for the client.

Monitor's Report 6 (June 15, 1980).

The opportunity to live outside a large institution is perhaps the most dramatic and immediate gain from these decrees. Returning home, near to families and friends, free from the regimentation of institutional life, retarded citizens have the potential to reestablish relationships and achieve a degree of independent living which were denied to them for so long. Beyond that, they learn to use the same services available to non-disabled people, such as transportation, legal, medical, recreation and religious facilities, thereby encouraging their integration into the rhythm of community life and avoiding the expense of establishing entirely separate services for the handicapped. *See* R. Flynn and K. Nitsch (eds.), *Normalization, Social Integration and Community Services* (1980).

Finally, clear evidence is now available that life in normalized community settings increases the independence and productivity of handicapped citizens at costs less than required to maintain these individuals in institutions. *See Report to the Congress* at 5-6; *Service Integration of Deinstitutionalization Project (SID) Report*, Vol. 5 (Cost/Benefit Analysis) (DHEW) (1975). Retarded persons who have suffered the regressive effects of compulsory institutionalization now enjoy the freedom to select their own lunch menu, to choose their own roommate, and to buy their own clothes.[44] From this exercise in self-determination has come a predictable gain in independence,[45] as well as the ability to enjoy the fundamental free-

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[44] Often these rights of self-determination are specifically promulgated in agency policy or regulation. *See* 104 C.M.R. 20.00 (mentally retarded) and 104 C.M.R. 14.00 (mentally ill) which are incorporated by reference in *MARC* v. *Dukakis*, *supra* (¶ 61) and *Brewster* v. *Dukakis*, *supra* (¶ 32).

[45] *See Report to the Congress* at 16-18; D. Braddock, *Opening Closed Doors: The Deinstitutionalization of Disabled Individuals* 99 (Council for Exceptional Children 1977).

doms of citizenship. *See* Herr, *The New Clients*, 31 Stan. L. Rev. 563 (1979). As one court official noted:

> In general, the new residential programs appear to be of good quality and clearly offer the resident an improved environment over the [institution]. Countless examples, discussed or personally witnessed during trips to the residential and non-residential programs, could attest to the new opportunities being offered to mentally ill and mentally retarded persons in these programs. Individuals forgotten for decades in the hospital are now receiving services in a profoundly moving way. Persons who could not communicate are now communicating; persons who could not walk or feed themselves are now ambulatory and are not only feeding themselves, but planning meals, assisting in the purchase and preparation of food and participating in the management of their own daily lives for the first time.

Brewster v. *Dukakis, supra*, Monitor's Report (Aug. 31, 1979).

E. *Judicial Supervision of the Implementation of Consent Decrees and Orders Providing for the Creation of Less Restrictive Community Alternatives Is a Necessary and Apppropriate Exercise of a Court's Equitable Powers.*

Given both the historical failure of states to implement established statutory policies favoring community programs for the retarded and the inherent complexity of creating alternatives to institutional care, experience has demonstrated that some mechanism must be established by district courts to oversee the implementation of their orders so as to enforce the statutory and constitutional rights of retarded plaintiffs. *NYSARC* v. *Carey, supra*; *Wuori* v. *Zitnay, supra*. *See* Note, *Implementation Problems in Institutional Reform Litigation*, 91 Harv. L. Rev. 428 (1977). Although courts have employed a

variety of approaches to provide this assistance,[46] these mechanisms share similar functions. Each is the primary resource for gathering unbiased data to inform the court of the status of the implementation of its order.[47] Each reviews and analyzes the defendants' specific plans for implementing their general obligations under the order and advises the court as to the acceptability of such plans.[48] Each monitors compliance with

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[46] *NYSARC* v. *Carey*, *supra*, established the Willowbrook Review Panel comprised of mental retardation professionals and other concerned citizens chosen by the defendants and plaintiffs, with the authority to compile information, monitor compliance, formulate remedial plans, resolve disputes, and make recommendations to the court. *Horacek* v. *Exon*, *supra*, adopted a similar approach. *Dixon* v. *Harris*, *supra*, approved the creation of a panel but made it responsible to the plaintiffs not the court, thereby limiting its functions to fact-finding and reviewing defendants' plans for compliance.

In *Wuori* v. *Zitnay*, *supra*, an individual selected by the parties was appointed by the court with similar powers to the Willowbrook Review Panel to oversee the implementation of a consent decree concerning Pineland Center. Since the parties themselves had negotiated a detailed remedial plan, the Special Master relies on state officials to develop implementation strategies, establish timetables, and allocate specific agency responsibilities. *Accord*, *Michigan ARC* v. *Smith*, *supra*; *Brewster* v. *Dukakis*, *supra*; *MARC* v. *Dukakis*, *supra*.

Finally, a special master with broad authority to gather information, devise remedial and structural reforms, resolve outstanding disagreements between the parties, and render binding recommendations was created in *Halderman* v. *Pennhurst*, *supra*. A similar mechanism was adopted in *Gary W.* v. *State of Louisiana*, *supra*, and *Davis* v. *Watkins*, *supra*. When Alabama state officials made little effort to achieve full compliance with a 1972 court order and when less drastic monitoring devices such as human rights committees proved ineffective, the court took the more extreme step of placing the state's mental disability system in receivership, although it appointed the Governor as the receiver. *Wyatt* v. *Hardin*, C.A. No. 3195-N (M.D. Ala. Supplemental Order Jan. 15, 1980).

[47] *See, e.g.*, *NYSARC* v. *Carey*, *supra*; *Horacek* v. *Exon*, *supra*; *Wuori* v. *Zitnay*, *supra*; *Michigan ARC* v. *Smith*, *supra*; *Brewster* v. *Dukakis*, *supra*; *MARC* v. *Dukakis*, *supra*; *Gary W.* v. *State of Louisiana*, *supra*; *Wyatt* v. *Hardin*, *supra*; *Halderman* v. *Pennhurst*, *supra*. *See* Note, *Implementation Problems in Institutional Reform Litigation*, *supra*.

[48] *Id.* This is a critical function given the complexity of system-development plans, the expertise necessary to evaluate the programmatic, clinical, administrative, and fiscal details of the plan, and the judicial economies of alternative review mechanisms.

implementation plans and assists all parties in identifying and resolving obstacles.[49] Finally, some serve to resolve disputes between the parties on issues affecting individual plaintiffs or the plaintiff-class, thereby promoting a mediated compromise instead of requiring the court's adjudication of adversarial claims.[50]

Courts have traditionally exercised their equitable power to appoint persons to assist them "in the performance of specific judicial duties. . . ." *Ex parte Peterson*, 253 U.S. 300, 312 (1920). Rule 53 of the Federal Rules of Civil Procedure codifies this power. *See generally*, 5A *Moore's Federal Practice*, ¶ 53.05 (3rd ed. 1975). It has been noted that the increase in public litigation suggests the need to utilize this authority in a flexible and unconstrained, albeit judicious, manner. *See* Chayes, *The Role of Judges In Public Law Litigation*, 89 Harv. L. Rev. 1281 (1976). Thus monitors have often been appointed to carry out far-reaching decrees in school desegregation cases, *e.g.*, *Morgan* v. *Kerrigan*, 523 F.2d 917 (1st Cir. 1975), 530 F.2d 401 (1st Cir. 1976), *cert. denied*, 426 U.S. 935

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[49] *Id.* Given the numerous state and federal agencies responsible for implementing various portions of the court's order, as well as traditional bureaucratic disincentives to change, numerous obstacles to full compliance predictably arise which can best be overcome through frequent mediation and conciliation efforts by an adjunct to the court.

[50] *See Wuori* v. *Zitnay*, *supra*; *NYSARC* v. *Carey*, *supra*; *Brewster* v. *Dukakis*, *supra*; *MARC* v. *Dukakis*, *supra*. The dispute resolution function is the one most nearly approaching traditional adjudication. However, the myriad of potential controversies arising from a system in transition and the intricate relationship between particular disputes and larger implementation issues render them most appropriate for resolution by a master, with review by the court if necessary, rather than consuming scarce judicial resources in the first instance. Of course, the master's authority would only be invoked when internal and less formal settlement mechanisms proved unsucessful. *Brewster* v. *Dukakis*, *supra* (¶ 55).

Where courts have initially declined to establish an appropriately empowered mechanism to oversee implementation, they have frequently had to reconsider this issue several years later as a result of the persistent violation of their orders. *Dixon* v. *Weinberger*, 405 F. Supp. 974 (D.D.C. 1975) (Motion for the Enforcement of Decree and Appointment of a Master, July 31, 1978); *Wyatt* v. *Hardin*, *supra*, (Motion for Further Relief, Nov. 20, 1978).

(1976); reapportionment cases, *e.g.*, *Moore* v. *LeFlore County Board of Election Commissioners*, 361 F. Supp. 603 (N.D.Miss. 1972), *aff'd*, 502 F.2d 621 (5th Cir.1974); prison reform cases, *e.g.*, *Cruz* v. *Hauck*, 515 F.2d 322 (5th Cir. 1975), *cert. denied*, 424 U.S. 917 (1976); housing cases, *e.g.*, *Gautreaux* v. *Chicago Housing Authority*, *supra;* juvenile detention homes, *e.g.*, *Gary W.* v. *State of Louisiana*, *supra* (Supplemental Order, Sept. 11, 1978), *aff'd*, 601 F.2d 240 (5th Cir. 1979); and special education suits, *e.g.*, *Mills* v. *Board of Education of the District of Columbia*, *supra* (Supplemental Order, July 23, 1975). *See also cases cited in Hart* v. *Community School Board*, 383 F. Supp. 699, 765 (S.D. N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975).

As in school desegregation cases, the federal courts have been unusually deferential in the first instance to the state agencies responsible for managing institutional facilities and establishing community care systems, leaving it to appropriate executive officials to propose remedial plans. *Bounds* v. *Smith*, 430 U.S. 817 (1977). Recognizing that these officials must ultimately bear the daily responsibility for insuring that the constitutional and statutory rights of the disabled are respected, courts have extended the defendants every opportunity to unilaterally modify and bring into compliance with existing federal and state mandates the conditions under which the government provides care to its retarded citizens.[51] When this invitation is accepted, the result is frequently a negotiated settlement or consent decree.[52] Only to the extent that state

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[51] In *Dixon* v. *Harris*, *supra*, the court patiently waited almost five years while the several federal and local defendants debated about their respective responsibilities. Even then, the court left it to the parties to prepare the plan, declining to enter any detailed directive to redress the plaintiffs' right to live in settings less restrictive than a huge federal institution. Although the court adopted a broad remedial order in *Wyatt* v. *Hardin*, *supra*, it did not move to authoritatively enforce its mandate for eight years. The Court of Appeals noted repeatedly the opportunities provided to the defendants to devise their own plan in order to avoid the necessity for any federally drafted remedy. *Halderman* v. *Pennhurst*, *supra*.

[52] In *Brewster* v. *Dukakis*, *supra*; *MARC* v. *Dukakis*, *supra*; *Wuori* v. *Zitnay*, *supra*, federal courts relied entirely on negotiations between the parties,

agencies balk at the findings and directives of the federal court are broad remedial orders required. *Halderman* v. *Pennhurst, supra.* Even then, these orders leave substantial flexibility for local governmental discretion and continue to seek the parties' cooperation in reviewing and implementing the proposed relief. *Brewster* v. *Dukakis, supra* (¶¶ 9-11, 49, 50). When persistent patterns of resistence remain, however, courts may have little choice but to order state officials to comply with detailed provisions of their order. *Hutto* v. *Finney, supra.* This is no more than what was required to translate this Court's judgment on the constitutional rights of minority children into a meaningful reality for black citizens in recalcitrant school districts. *Milliken* v. *Bradley, supra*; *Swann* v. *Charlotte-Mecklenburg Board of Education, supra.*

In virtually all suits seeking to enforce the rights of retarded citizens to live in less restrictive community programs, courts have noted that noninstitutional alternatives are professionally desirable and, in fact, clearly required under accepted state law and policy. *NYSARC* v. *Carey, supra*; *Welsch* v. *Dirkswager, supra*; *Halderman* v. *Pennhurst, supra*; *Brewster* v. *Dukakis, supra*; *MARC* v. *Dukakis, supra*; *Michigan ARC* v. *Smith, supra.* The intrusiveness of federal court intervention is thus a function of the illegality of the conditions under which retarded persons are confined and the willingness of state officials to promptly redress these violations of individual rights. *Hutto* v. *Finney, supra.* This is particularly true to the extent that a court seeks to remedy an ongoing deprivation of a constitutional or statutory guarantee as opposed to merely reviewing a previous condition. Remedial orders often do little more than incorporate federal and state governmental directives, with some further specification of compliance responsibilities, in order to increase the likelihood that traditional

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supervised by the courts, to produce a settlement and implementation plan. A similar approach succeeded in producing consent decrees in *Welsh* v. *Dirkswager,* C.A. No. 4-72 C. 451 (D. Minn. 1977); *Michigan ARC* v. *Smith, supra*; *Gary W.* v. *State of Louisiana, supra*; and *Evans* v. *Washington, supra.*

patterns of inaction will be halted. *Hutto* v. *Finney, supra.* To the extent that these orders or consent decrees propose to implement existing rights incorporated in enacted, albeit unenforced, federal and state law and policy, judicial intervention poses little threat to the independent functioning of state agencies and is entirely in conformity with traditional exercises of equitable powers.[53]

F. *States Which Have Begun to Create Community Alternatives Should Be Given the Necessary Flexibility to Design and Develop Services in Cooperation with Concerned Citizens and Responsible Professionals.*

The network of community programs which is emerging in many states throughout the country is unique to the conditions and needs of each locality. The complexity of developing comprehensive residential and nonresidential programs in geographically distinct settings and of creating an effective administrative mechanism to coordinate and monitor the delivery of appropriate services to retarded persons requires flexible and varied approaches. No single formula or design has been accepted by legislatures, state officials, or professionals. While the mandate to establish community programs as alternatives to institutions is clear, and while the guiding principles of that system are now fully accepted,[54] states must be afforded con-

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[53] That judicial monitoring is accepted by state defendants is evidenced both by negotiated settlements in most institutional litigation which include a provision for court monitors, *NYSARC* v. *Carey, supra*; *Brewster* v. *Dukakis, supra*; *MARC* v. *Dukakis, supra*, as well as by direct admission of executive officials. The Commissioner of the Maine Department of Mental Health and Corrections, testifying as a defendants' expert in *Garrity* v. *Gallen, supra*, stated that the intervention of the federal courts, together with the appointment of the Special Master to oversee the implementation of the consent decree in *Wuori* v. *Zitnay, supra*, were important factors to ensure that the defendants' obligations to create community alternatives were fully honored. (Test. of K. Concannon).

[54] Virtually all the professional literature, federal and state statutes and policies, and the negotiated settlements to pending litigation refer to the principles of normalization and less restrictive alternatives as the theoretical underpinnings of community care. *Wuori* v. *Zitnay, supra* (App. B, Sec. A);

siderable latitude in formulating the scope, content, and details of their community services.

Differences between community systems have arisen for a number of reasons. Some states have taken a comprehensive approach to replacing their institutions with less restrictive alternatives for several distinct citizen populations, including the mentally retarded, mentally ill, juveniles, and elderly, while others have focused their efforts on only one or two of these groups.[55] Some states have undertaken the development of a broad range of residential and nonresidential programs in order to provide retarded persons living in the community with effective services to prevent unnecessary reinstitutionalization rather than to simply locate alternative housing for formerly institutionalized persons.[56] Most, however, have recognized but hardly begun to implement the various legislative and executive mandates that require community services.

The uniqueness of community care systems in each state is further highlighted by the varied responses of government of-

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NYSARC v. *Carey*, *supra* (App A, Pt. A); *Brewster* v. *Dukakis*, *supra* (¶ 8(b)); *See Flynn and Nitsch*, *supra*; *See also* federal and state statutes discussed in Part II, *supra*.

[55] In addition to its commitment to disabled persons under the *MARC* and *Brewster* decrees, *supra*, Massachusetts has virtually eliminated all juvenile detention facilities and is committed to providing alternatives to nursing homes for elderly persons. Report of the Massachusetts Department of Public Health, *Alternative Care Package* (1974). Other states have similarly recognized the common element of harm attendant to all custodial institutions as well as the mounting expense associated with maintaining these facilities and providing institutional care in conformity with constitutional, statutory and regulatory requirements. *See* Calif. Welf. & Inst. Code § 5675 (West).

[56] Most negotiated settlements include a recognition that an effective and minimally adequate network of community services must include nonresidential habilitation and support programs as well as residential alternatives. *Brewster* v. *Dukakis*, *supra*, (¶ 8(a), Atts. B and C); *Wuori* v. *Zitnay*, *supra*, (App. B); *MARC* v. *Dukakis*, *supra*, (¶ 34(b)). Apart from such suits, numerous states have developed at least a limited number of housing programs for disabled persons. See *Report to the Congress* at 161-164; Heal, Sigelman, and Switzky, *Research on Community Residential Alternatives for the Mentally Retarded*, in Flynn and Nitsch, *supra*.

ficials to the almost unanimous findings of federal courts that retarded persons are being unnecessarily, inappropriately, and illegally confined in institutions due to a lack of available community programs. Although some have resisted, the majority of states have acknowledged the appropriateness of creating suitable, less restrictive alternatives and have negotiated settlements to pending litigation.[57] These consent decrees represent a consensus among all concerned parties — handicapped citizens, consumer advocacy organizations, professionals and government officers — that the mandate to develop community alternatives can no longer be delayed. Each decree incorporates the results of protracted negotiations and thus reflects a delicate balance between the particular interests of all concerned parties. Most importantly, each decree holds the promise that the historical patterns of needlessly confining retarded persons in large institutions, with the attendant deprivation of their constitutionally protected liberties, may finally be broken. Since these settlements were generally negotiated in the context of a mutually shared perception as to the constitutional and statutory responsibilities of state officials, this Court should be wary of taking any action which would disrupt the long awaited development of community alternatives or which would intrude upon the cooperative efforts of citizens and their governments in many sections of the country.

CONCLUSION.

Most public institutions which house retarded citizens in this country are a well-documented disgrace. For the retarded, the result of confinement under such intolerable conditions has been the loss of physical health, developmental potential,

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[57] *See* cases cited p. 33. Even some of those that have not entered into consent judgments have recognized the desirability of switching from institutional to community-based services and, in fact, primarily oppose the legal actions of retarded citizens because of a preoccupation with and misperception about fiscal costs. *See* Brief of Amici Curiae Illinois *et al.* 38.

and fundamental freedoms. Congress and many state legislatures have recognized this historical segregation of retarded people and mandated the creation of structured community alternatives where disabled persons can once again live normal and productive lives. That courts have had to enforce these legislative and policy directives is an unfortunate but unavoidable reality. To limit their discretion or to recall that mandate would be to consign another generation of retarded citizens to institutional stagnation.

The decision of the Court of Appeals should be affirmed.

Respectfully submitted,

STEVEN J. SCHWARTZ,
ROBERT D. FLEISCHNER,
MENTAL PATIENTS ADVOCACY PROJECT
Western Massachusetts Legal Services
76 Pleasant Street
Northampton, Massachusetts 01060
(413) 584-1644, ext. 265
Attorneys for the Plaintiff Class in Brewster v. Dukakis and for the Massachusetts Association for Mental Health

DAVID C. SHAW
LEGAL AID SOCIETY OF HARTFORD
525 Main Street
Hartford, Connecticut 06103
(203) 566-6360
Attorney for the Plaintiff Class in Connecticut Association for Retarded Citizens v. Thorne

BRIAN P. LAWLOR
LEGAL AID SOCIETY, INC.
425 West Muhammad Ali Blvd.
Fourth Floor
Louisville, Kentucky 40202
(502) 584-1254
Attorney for the Plaintiff Class in Kentucky Association for Retarded Citizens v. Conn and for the Kentucky Association for Retarded Citizens

NEVILLE WOODRUFF
193 Middle Street
Portland, Maine 04101
(207) 773-7432
Attorney for the Plaintiff Class in Wuori v. Zitnay

RICHARD W. RENEHAN
NONNIE S. BURNES
HILL AND BARLOW
225 Franklin Street
Boston, Massachusetts 02110
(617) 423-6200
Atorneys for the Plaintiff Class in Massachusetts Association for Retarded Citizens v. Dukakis and for the Massachusetts Association for Retarded Citizens

WILLIAM J. CAMPBELL
MICHIGAN PROTECTION AND ADVOCACY SERVICE FOR DEVELOPMENTALLY DISABLED CITIZENS
230 North Washington Square
Suite 200
Lansing, Michigan 48933
(517) 487-1755
Attorney for the Plaintiff Class in Michigan Association for Retarded Citizens v. Smith

RICHARD A. COHEN
JOHN D. MACINTOSH
ALAN CRONHEIM
NEW HAMPSHIRE LEGAL ASSISTANCE
136 North Main Street
Concord, New Hampshire 03301
(603) 224-3333
Attorneys for the Plaintiff Class in Garrity v. Gallen

CHRISTOPHER A. HANSEN
ROBERT LEVY
NEW YORK CIVIL LIBERTIES UNION
84 5th Avenue — Room 300
New York, New York 10011
(212) 924-7800
Attorneys for the Plaintiff Class in New York State Association for Retarded Children v. Carey and the New York Civil Liberties Union

PAUL JAMESON
JAMESON, LOCKE & FULLERTON
8 Grove Street
Wellesley, Massachusetts 02187
(617) 235-7000
Attorney for the Plaintiff Class in Isomone v. Garrahy

LINDA POTTER
EVERGREEN LEGAL SERVICES
Pioneer Square Office
618 Second Avenue
Seattle, Washington 98104
(206) 464-5911
Attorney for the Plaintiff Class in Washington Association for Retarded Citizens v. Thomas and for the Washington Association for Retarded Citizens

GAIL FALK
DEVELOPMENT DISABILITIES LAW PROJECT
Appalachian Research and Defense Fund, Inc.
1116-B Kanawha Boulevard East
Charleston, West Virginia 25301
(304) 344-9687
Attorney for the Plaintiff Class in Medley v. Ginsberg

RICHARD F. HOWARD
WILLIAM CRANE
DEVELOPMENTAL DISABILITIES LAW CENTER
294 Washington Street
Suite 840
Boston, Massachusetts 02108
(617) 426-7020

MARK S. COVEN
GREATER BOSTON LEGAL SERVICES
102 Norway Street
Boston, Massachusetts 02110
(617) 536-0400

PAULA MACKIN
NORMA D'APOLITO
JUVENILE LAW REFORM PROJECT
85 Devonshire Street
Boston, Massachusetts 02109
(617) 367-2880

ERICK H. WISE
WESTERN CENTER ON LAW AND POVERTY
3535 West 6th Street
Los Angeles, California 90002

WILLIAM G. REEDY
SALLY G. FOX
VERMONT DEVELOPMENTAL DISABILITY LAW PROJECT
180 Church Street
Old Courthouse
Burlington, Vermont 05492
(802) 863-2881

STANLEY S. HERR
435 West 116th Street
New York, New York 10027
(212) 280-2360

THOMAS B. LESSER
LESSER, NEWMAN, SIBBISON SOUWEINE
39 Main Street
Northampton, Massachusetts 01060
(413) 584-7331

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